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### **REMARKS**

Claims 1-23 and 35-49 are pending. In the current Office Action, the Examiner has maintained essentially two sets of rejections, one based on the Roskam et al. (US 2003/0044488 A1) application as the primary reference in making obviousness rejections of claims 1-9 and 14-23 and a second set of claims primarily based upon the Lazard et al. EP 0547551 application as the primary reference in obviousness rejections of claims 1-5, 7-23 and 35-49. Applicants respectfully request reconsideration of the present application in light of the enclosed amendments to the claims and the following remarks.

Applicants have amended claim 35 to remove "from" which was a typographical error. Applicants believe this addresses the Examiner's objections to claims 35-42, and 48-49. Also, Applicants have amended claim 6 without changing the scope of the claim to address the Examiner's concerns with the claim. The claim has been amended to state that "...the oxidized and substituted wheat starch is an oxidized and acetylated wheat starch where the substitution level is from 0.01% to about 1% acetylation." Regarding claims 10, 11, 14, 22 and 43, these claims have been amended to state "dry" weight, as suggested by the Examiner.

### **Rejections under 35 U.S.C. § 103(a) based primarily on the Roskam et al. '488 Application**

The Examiner has maintained the rejection of claims 1-5, 7-9, and 14-23, under § 103(a), as obvious in view of the Roskam '488 Publication (published March 6, 2003) and the Lenchin '166 Patent.

Applicants respectfully submit that they have overcome this rejection for two separate reasons. First, Applicants have submitted a Declaration under 37 CFR § 1.132, which removes the '488 publication as a reference under § 102(a). Section 716.10 of the MPEP states:

Under certain circumstances an affidavit or declaration may be submitted which attempts to attribute an activity, a reference or part of a reference to the applicant. If successful, the activity or the reference is no longer applicable. When subject matter,

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disclosed but not claimed in a patent application filed jointly by S and another, is claimed in a later application filed by S, the joint patent or joint patent application publication is a valid reference available as prior art under 35 U.S.C. 102(a), (e), or (f) unless overcome by affidavit or declaration under 37 CFR 1.131 showing prior invention (see MPEP § 715) or an unequivocal declaration by S under 37 CFR 1.132 that he or she conceived or invented the subject matter disclosed in the patent or published application.

The Declaration of Cheree Stevens and Robert Roskam states that the portion of the '488 application relied upon by the Examiner was invented by them. Paragraphs 3 and 4 of that declaration state:

3. We are also inventors of the subject matter of the US 2003/0044488 A1 application which relates to the application of a coating composition to a toaster pastry product.

4. The other two named inventors, John F. Stevens and Joel R. Tinsley, listed on the face of the US 2003/0044488 A1 publication were so listed for their contributions to coatings described for application to substrates other than toaster pastries. The US 2003/0044488 A1 publication also describes coating compositions for application to other substrates such as potato chips, tortilla chips, curls, puffs, and other snack/convenience food items.

(Declaration Under 37 CFR §1.132, paragraphs 3-4). Accordingly, the '488 application is not a valid reference against the present application.

Second, Applicants' previously submitted Rule 131 declaration was sufficient to antedate the Roskam '488 publication. Specifically, Applicants previously submitted a Rule 131 declaration, attempting to antedate the Roskam '488 Publication, which the Examiner found to be persuasive with respect to some of the claims. The Examiner has found the Rule 131 declaration insufficient for the remaining claims, stating that they:

do[] not establish possession of [the] whole invention as claimed or something falling within the claim, in the sense that the claim

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as a whole reads on it (MPEP 715.02). For example, the affidavit shows a coating that was reduced to practice with a starch percentage of about [sic] dextrin of about 32%; the affidavit does not include starch coating showing 5% dextrin or 75% dextrin.

(June 2, 2010, Office Action at p. 14). (Applicants assume the Examiner has inherently taken the position that the showing provided would not have rendered the remainder to the ranges claimed obvious given the language of MPEP § 715.02, paragraph three).<sup>1</sup> However, the overlap between the Rule 131 evidence and the reference upon which the Examiner relies need not be *identical*. *In re Clarke*, 356 F.2d at 992. As the Board has recently explained:

This standard—that a Rule 131 declaration showing the basic invention is sufficient to antedate a reference—addresses what the *Spiller* court seemed to view as a hypertechnical application of the Rule 131 requirement that the evidence show all of the limitations of the later-filed claims.

*In re Goddard*, 2009 WL 2807704, at \*6 (B.P.A.I. Aug. 31, 2009).

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<sup>1</sup> MPEP § 715.02 states:

Even if applicant's **37 CFR 1.131** affidavit is not fully commensurate with the rejected claim, the applicant can still overcome the rejection by showing that the differences between the claimed invention and the showing under **37 CFR 1.131** would have been obvious to one of ordinary skill in the art, in view of applicant's **37 CFR 1.131** evidence, prior to the effective date of the reference(s) or the activity. Such evidence is sufficient because applicant's possession of what is shown carries with it possession of variations and adaptations which would have been obvious, at the same time, to one of ordinary skill in the art. However, the affidavit or declaration showing must still establish possession of the invention (i.e., the basic inventive concept) and not just of what one reference (in a combination of applied references) happens to show, if that reference does not itself teach the basic inventive concept. *In re Spiller*, 500 F.2d 1170, 182 USPQ 614 (CCPA 1974) (Claimed invention was use of electrostatic forces to adhere dry starch particles to a wet paper web on the Fourdrinier wire of a paper-making machine. **37 CFR 1.131** affidavit established use of electrostatic forces to adhere starch particles to wet blotting paper moved over a fluidized bed of starch particles prior to the applied reference date. Affidavit was sufficient in view of prior art reference showing that deposition of dry coatings directly on wet webs on the Fourdrinier wire of a paper-making machine was well known in the art prior to the date of the applied reference. The affidavit established possession of the basic invention, i.e., use of electrostatic forces to adhere starch to wet paper.).

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Accordingly, based upon the previously submitted Declaration under 37 CFR § 1.131 and/or the Declaration under 37 CFR §1.132, Applicants believe the rejections based upon the '488 publication have been overcome. The '488 publication is not a proper reference under § 102(a) with respect to the subject matter of the presently pending claims.

**Rejections under 35 U.S.C. § 103(a) based primarily on Lazard et al. (EP 0547551 A1)**

The Examiner continues to reject all of the claims based upon various combinations of references utilizing the '551 patent application to Lazard et al. as the primary reference. Applicants previously submitted the Declaration of Cheree Stevens showing, among other things, the deleterious effect of gelatin on the various coatings. In particular, Applicants demonstrated how the incorporation of gelatin, a required component of Lazard et al.'s coatings, renders even Applicants' own coating visible and unacceptable in the amounts disclosed. The Declaration of Cheree Stevens also demonstrates Applicants' own invention stating:

As demonstrated by the above experimental results shown in Exhibit 3, the toaster pastry coated with a clear coating composition of the present invention (Control Test) resulted in a coating that adhered to the toaster pastry and was substantially clear and invisible. As a result, the consumer would not readily notice that the coated toaster pastry was even coated at all.

(Paragraph 22 of the Declaration of Cheree Stevens, March 25, 2010). The experiments incorporating gelatin are disclosed in the same declaration at paragraphs 20 and 21, which state:

As demonstrated by the above experimental results shown in Exhibit 3, the toaster pastries coated with the coating composition of Table XIII of Lazard et al. (Tests A and B) exhibited a coating that did not adhere to the surface of the pastry and raised the skin of the pastry during the baking process. The baked coatings were thick, messy, opaque, and clearly visible and resulted in a pastry product that no longer resembled a toaster pastry.

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As demonstrated by the above experimental results shown in Exhibit 3, the toaster pastry coated with the coating of the present invention with added gelatin, a component of Lazard, (Test C) resulted in a coating that did not adhere to the surface of the pastry and raised the skin of the pastry during the baking process. The film was tough, plastic-like, visible, and opaque and lifted away from the pastry surface resulting in a pastry product that no longer resembled a toaster pastry. The gelatin had a significantly adverse effect on the coating composition and resulted in a practically inedible product.

(Paragraphs 20-21 of the Declaration of Cheree Stevens). In response to the Applicants' argument that the coatings of Lazard et al. would not be at least substantially clear due to the incorporation of gelatin, a required component of Lazard et al., but rather are clearly visible, the Examiner states:

Applicant argues in the declaration and the remarks that the coating of Lazard is visible as it contains fat and gelatin. Applicant's argument is not convincing as fat is an optional ingredient (abstract) and as Lazard teaches that the coating composition is translucent (Page 9, lines 19-24). Applicant's additional evidence cited in the declaration is not convincing as the experimental ingredients of Lazard do not include all essential ingredients, and thus do not represent an accurate representation of the teachings, and as from the pictures given of exhibit C it cannot be determined that the pastry coating is not clear. Additionally it is noted that not all of the claims require an invisible or clear coat, but rather only a "substantially clear" coating.

(June 2, 2010, Office Action at page 15). As discussed above, the previously submitted Declaration of Cheree Stevens demonstrates that the coatings incorporating gelatin (and not fat, which is optional in some embodiments as noted by the Examiner, but an element of Lazard et al.'s moisture barrier embodiments) resulted in a coating that was readily visible. Apparently, the photos previously provided in the response were not sufficiently viewable to allow the Examiner to determine that the coatings were not clear. The pictures previously submitted and attached to the declaration as Exhibit C are attached to this response as Exhibit 1. Color

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photos of this information will be forwarded to the Examiner along with the physical samples that relate to the Third Declaration of Cheree Stevens discussed below, as suggested by the Examiner.

Also, the Examiner apparently takes issue with the experimentation as not incorporating all of the essential ingredients (presumably a plasticizer). The original declaration was primarily meant to show the overall effect of the gelatin on the coatings. Regardless, as suggested by the Examiner, Ms. Cheree Stevens conducted additional experimentation to demonstrate the readily visible nature of the moisture barrier coatings of Lazard et al. These experiments and results are shown in the Third Declaration of Cheree Stevens submitted along with this response.

As suggested by the Examiner, Ms. Stevens replicated the moisture barrier embodiments of the Lazard et al. reference with gelatin at the minimum level (since higher amounts will make the product worse/more visible) and levels of glycerol (plasticizer) across the full range of 10%-45%, namely 10%, 27.5% and 45% glycerol. As can be seen from the photographs attached as Exhibit 2, as was the case in the previous testing, the coatings of Lazard et al. resulted in an obviously visible coating that clearly detracts from the appearance of the toaster pastries (Third Declaration of Cheree Stevens at paragraph 8). All of the pending claims require that the coating of the toaster pastry be (1) at least substantially clear, (2) that it not detract from the appearance of the toaster pastry, i.e., the consumer does not readily notice that the coated toaster pastry was even coated, and/or (3) the coating is invisible on the toaster pastry. The Lazard et al. coatings, due at least in part to the incorporation of gelatin, result in coatings that do not adhere to the toaster pastry, are readily visible and detract from the appearance of the toaster pastry. Accordingly, the various rejections based upon the Lazard et al. reference are improper and should be withdrawn.

Finally, Applicants have filed Terminal Disclaimers along with this response to address the Examiner's provisional double patenting rejection based upon United States Patent Application Serial No. 12/257,249.

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If the Examiner has any questions or would like to discuss the application further,  
please do not hesitate to contact the undersigned at the phone number listed below.

Respectfully submitted,

December 2, 2010

Date



Todd A. Van Thomme

Registration No. 44,285

Price, Heneveld, Cooper, Dewitt & Litton, LLP  
695 Kenmoor, S.E.

Post Office Box 2567

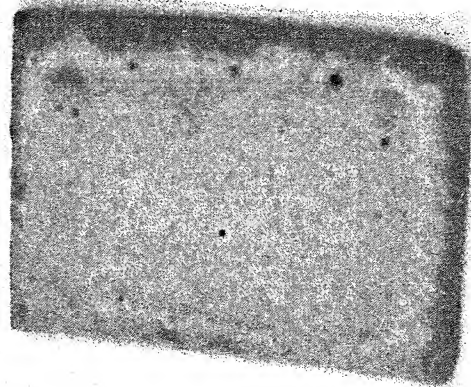
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(616) 949-9610

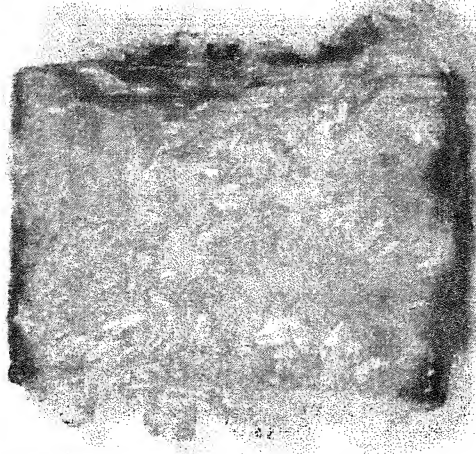
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# EXHIBIT 1

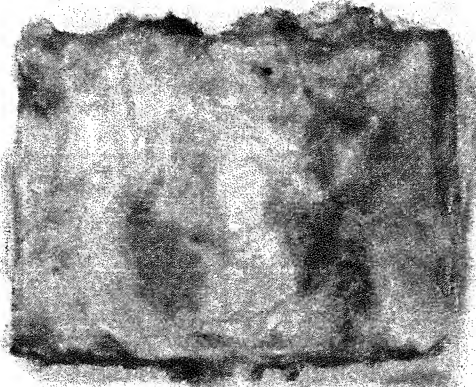




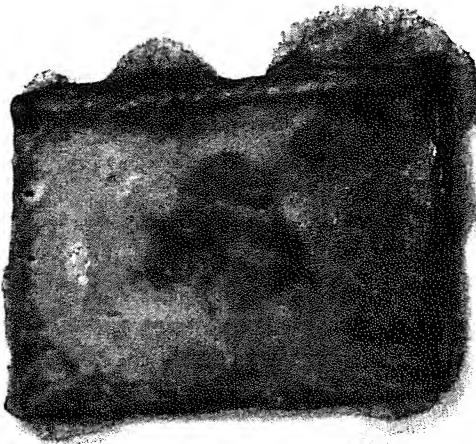
Stevens Clear Coat



Test A



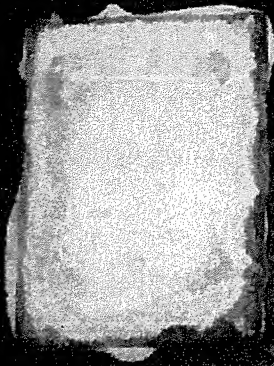
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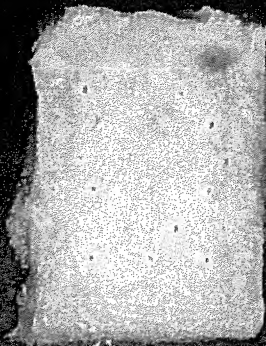
Test C

## EXHIBIT 2

TEST A



TEST B



TEST C

